No. 05-987

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005

WALTER J. LAWRENCE,
Petitioner,

v.

CAROL A. ANTONUCCI,
RICHARD J. ROTELLA, and
RONALD D. ANTON
Respondents, each in their
Individual and Personal Capacity

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

Walter J. Lawrence
Petitioner in pro per
#162
3101 SW 34th Ave. #905
Ocala, FL 34474
1-941-586-7024

October, 2005

Walter J. Lawrence respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

QUESTIONS PRESENTED

1. Whether the Second Circuit's requirement that all § 1983 plaintiffs exhaust state administrative remedies conflicts with the repeatedly reaffirmed holding by this Court that exhaustion of administrative remedies in § 1983 cases may not be required.

2 Whether the Second Circuit's requirement that all § 1983 plaintiffs exhaust state administrative remedies is inconsistent with intent of Congress, especially the with enactment of a carefully tailored, limited exhaustion requirement in section 7 of the Civil Rights of Institutionalized Persons Act. P.L. 96-247, 42 U.S.C. § 1997e.

3. Whether the Second Circuit erred in requiring plaintiff in a § 1983 action seeking injunctive relief or damages to exhaust state administrative remedies where the defendant failed to

demonstrate that such remedies would be plain, speedy, and effective, and where and where the in an Article 78 proceeding under § 1983 the administrative process is not empowered to grant damages sought by plaintiff.

LIST OF ALL PARTIES

This is to certify that the following entities are the parties and interested persons in this case:

Anton, Ronald D. Corporation Counsel for the City of Niagara Falls.

Antonucci, Carol Defendant/Appellee in her individual and personal capacity

Foschio, Leslie G., U.S. District Court Magistrate

Lawrence, Walter J. , Petitioner in pro per

Rotella, Richard J. Assistant Corporation Counsel for the City of Niagara Falls.

Skretny, William M., U.S. District Court Judge Western District of New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution and Statutes

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS. RULE 14(1)(d)

The summary order and judgment of the of the District Court dismissing the complaint for failure to exhaust State of New York administrative remedies dated March 16, 2005 WL 643457, (App. at pages A-1 to A-27) (W.D.N.Y., March 16, 2005)

The Summary Order and Judgment of the Second Circuit Court of Appeals, entered on September 27, 2005, 2005 WL 2365337 (CA2, 2005), (App. A at pages A-21 to A-27) is not reported pursuant to the Judgment Mandate of the Court entered on September 27, 2005 .

OPINIONS BELOW

The Summary Order and Judgment of the Second Circuit Court of Appeals, entered on September 27, 2005, 2005 WL 2365337 (CA2, 2005), (App. A at pages A-21 to A-27) is not reported pursuant to the Judgment Mandate of the Court entered on September 27, 2005. The summary order and judgment of the of the District Court dismissing the complaint for failure to exhaust State of New York administrative remedies dated March 16, 2005 WL 643457,

(App. at pages A-1 to A-27) (W.D.N.Y., March 16, 2005).

JURISDICTION

The Judgment Mandate of the Second Circuit Court of Appeals (App. Pages a-21 to A-27) was entered on September 27, 2005. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983; New York Municipal Law §§ 50-e(a) and 50-I: New York CPLR 7806. Appendix A-27 to A-28.

STATEMENT OF THE CASE

On March 12, 2004 Plaintiff, Walter J. Lawrence ("hereinafter "Lawrence"), mailed to Defendant, Carol A. Antonucci, (hereinafter "Antonucci"), the Clerk of the City of Niagara Falls, State of New York, a Freedom of Information Law (hereinafter "FOIL") request letter pursuant to the State of New York Public Officer Law, Article 6, Section 84, 86, Article 86(2), Article 87.

After mailing the above letter to Antonucci, Lawrence waited more than the five days from March 12, 2004 for Antonucci to reply to Plaintiff FOIL request of March 12, 2004 but no reply was received from Antonucci. or any other governmental entity.

FACTS

On March 12, 2004, Plaintiff, Walter J. Lawrence ("hereinafter "Lawrence"), mailed by U.S. Certified mail 7003 1010 0004 3351 5157, the Clerk of the City of Niagara Falls, State of New York, a Freedom of Information Law (hereinafter "FOIL") request letter pursuant to the State of New York Public Officer Law, Article 6, Section 84, 86, Article 86(2), Article 87.

Immediately after mailing the above letter to Antonucci on March 12, 2004, Lawrence waited more than the required five (5) days for Antonucci to reply to Lawrence's FOIL request of March 12, 2004. Lawrence not having received any reply to his FOIL request of march 12, 2004, he com .ienced this action on May 17, 2004. The time for Defendant to answer the original Verified Complaint has not yet expired as of the date of the filing of this First Amended Verified Complaint.

Defendant filed a motion to dismiss on February 12, 2004. On August 31, 2004 the District Court entered an order granting Defendant's Motion to Dismiss.

On September 15, 2004, Petitioner filed his Notice of Appeal with the District Court. The Second Circuit Court o Appeals entered its Order on September 27, 2005.

REASONS FOR GRANTING THE WRIT

I.. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT , COURTS OF APPEALS AND STATE COURTS

The State of New York has affirmatively withdrawn the

remedy of damages in an Article 78 § 1983 proceeding. CPLR 7806. Moreover, even if damages were available, this Court has repeatedly held, or stated without qualification, that exhaustion of state administrative remedies is not required in § 1983 cases. Heck v. Humphrey, 512 U.S. 477)1994); Felder v. Casey, 487 U.S. 131 (1988); Patsy v. Board of Regents, 457 U.S. 496, 498 (1982); McNeese v. Board of Education, 373 U.S. 668 (1962) (Plainly, "[w]e would defeat [the purposes of 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court."). Every member of this Court has agreed that the question has long been settled. Indeed, exhaustion is only necessary prior to bringing a section 1983 action "where Congress has carved out a specific exception to the general rule that exhaustion is not required." Doe v. Pfrommer, 148 F.3d 73, 78 (CA2, 1998), citing this Court in Patsy, 457 U.S. at 512. In this case, although N.Y. Municipal Law §§ 50-e and 50-I does not provide for damages in a § 1983 Article 78 proceeding, the State defendants fail to point out any indication of Congressional intent to require the exhaustion of

such state remedies prior to bringing a section 1983 action federal court. See Pfrommer, 148 F.3d at 78.

42 USC 1983 is a pre-emptive act of Congress under the Supremacy Clause. Here, Section 1983 is "necessary and proper" to Congress's Powers under the Supremacy Clause. Felder v. Casey, 487 U.S. 131, 138 (1988) ("Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

This case goes to heart of the subject matter jurisdiction of the State of New York and the federal court. The inquiry in this action centers not on what Petitioner did or did not do in not availing himself of an Article 78 § 1983 proceeding in State of New York but on whether the State court had the power - the subject matter jurisdiction - to grant Petitioner the damages relief sought by Petitioner in this federal action.

The Federal Courts and the Court of the State of New York

hold that Petitioner need not comply with a state's notice of claim requirements in an Article 78 § 1983 proceeding. Meiselman v. Richardson, 743 F. Supp 143, 145 (E.D.N.Y 1990):

> The decision of the United States Supreme Court in *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), is directly on point and dispositive of this issue as a matter of law. The Supreme Court clearly stated that a plaintiff bringing an action under section 1983 need not comply with a state's notice of claim requirements (id. At p. 140, 108 S.Ct. at p. 2308). The Court concluded that such statutes are preempted by and inconsistent with federal law (id. at p. 134, 108 S.Ct. at p. 2304)..

Under these circumstances, the decisions below flagrantly violates this Court's precedents, the Second Circuit's precedent and the various states precedent obligation to obey this Court's decisions unless and until overruled. Rodriquez de Quijas v. Shearson/American Express, Inc , 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989) If for no other reason, certiorari should issue to summarily correct the Second Circuit's and the District Court's misapprehension of the their responsibilities. Federal Communications Commission v.

Broadcasting Services Organization, 337 U.S. 901 (1949); Securities and Exchange Commission v. Otis & co., 338 U.S. 843 (1949), Petitioner believes reversal appropriate because of this Court's precedent, the Second Circuit's precedent, and the State of New York's and other Federal Circuits and States precedent, full consideration upon briefs and oral argument would plainly be warranted in preference to the denial of certiorai. In light of the repeated reaffirmation of the no-exhaustion rule, even by its critics, City of Columbus v. Leonard, 443 U.S. 905 (1979), a discretionary decision to let the judgment below stand would severely undermine the authority of this Court's decisions. Settled principles of stare decisis may not require slavish adherence to the no-exhaustion decisions, see Monell v. Department of Social Services, 436 U.S. 658 (1978), but they do not permit their casual disregard through the failure to exercise the Court's discretionary jurisdiction.

The judgment below deprives petitioner of his repeatedly reaffirmed right to prompt federal consideration of ripe § 1983 claims. The Second Circuit's decision to subject him to an

extensive delay in addition to the two year delay has already been compelled to accept, all in direct conflict with decisions of this Court and decisions of numerous Courts of Appeals and State Court decisions, warrants this Court's review. Therefore, as a matter of law, 'compliance with notice of claim requirements of General Municipal Law § 50-e is not necessary to recover for alleged violations of a party's civil rights under 42 U.S.C. § 1983') Rattern v. Planning Comm'n of Pleasantville, 156 A.D2d 521, 525, 548 N.Y.S.2d 943, 947 [2d Dep't 1989] *citing Felder v. Casey*, supra). Same, Nussle v. Willette, 224 F.3d 95 (CA2, 1999), rev'd on other grounds, Porter v. Nussle, 534 U.S. 516 (2002); Same, Jenkins v. Haubert, 179 F3d 19, 1999 WL 331871 (CA2, 1999) (" citing the Legislative purpose [of section 1983] the Supreme Court has consistently held that courts should not 'impose an exhaustion requirement on §1983.' See Patsy 457 U.S. 502,"). 512."); Lawrence v. Goord, 238 F.3d 182, (CA2, 2000) ("Congress has made no such provision requiring the exhaustion of administrative remedies in section 1983 actions."); Lawless v. City of Buffalo, 578 N.Y.S.2d 27

(A.D. 4 Dept. 1991); Gade v. National Solid Waste Management Association, 505 U.S. 88 (1992) ("...any state law, however clearly within a state's acknowledgment power, must yield if it interferes with or is contrary to federal law. Felder v. Casey, 487 U.S. 131, 138."); Howlett v. Rose, 496 U.S. 356 (1990)

The Supreme Court has said that even if the state remedy is available in practice, it need not be exhausted before bringing a section 1983 suit. See Patsy v. Board of Regents, 457 U.S. 496, 516, 102 S.Ct. 2556, 2568 (1982). In Patsy, the Supreme court held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." Id.; Alacare, Inc.-North v. Baggiano, 785 F.2d 963, 970 (CA11, 1986) (holding that exhaustion of remedies was not required n section 1983 action alleging violation of Medicaid Act.).

However, there was no state remedy that was available to Petitioner that would give Petitioner a post-deprivation remedy. There are several reasons for this. **First**, Petitioner sued Defendants in her individual and personal capacity. **Second,**

Petitioner could not obtain any damages in his section 1983 action because the damages were incidental to the primary relief of the release of the documents requested by Plaintiff from Defendants. CPLR 7806. **Third**, if Petitioner would have commenced an article 78 proceeding it would have been subject to dismissal for lack of jurisdiction.

Official Capacity v. Personal Capacity

First, this is a personal capacity lawsuit as opposed to an official-capacity lawsuit. Hafer v. Melo. 502 U.S. 21, 116 L.Ed.2d 301, 112 S.Ct. 358 (1991) ("Personal capacity suits...seek to impose individual liability upon a government official for actions taken under color of state law. Thus, on the merits, to establish personal liability in a section 1983, it is enough to show that the official acting under color of state law caused the deprivation of a federal right."). Defendants had a legal duty to provide to Petitioner the documents that he requested of Defendants and that Defendants orally promised to Petitioner that she ould deliver to Petitioner . This she failed and refused to do.

Defendants's refusal to abide by the State of New York

Freedom of Information Law and the Freedom of Information law Ordinances of the City of Niagara Falls, N.Y is what makes this lawsuit actionable as a personal capacity lawsuit as opposed to an official-capacity lawsuit. While Personal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law." official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent" and in essence are "suits against an entity". Kentucky v. Graham, 473 U.S. 159, 165-66, 87 L.Ed.2d 114. 105 S.Ct. 3099 (1985). Because the real party in interest in an official-capacity suit is the entity itself, a plaintiff can only recover damages from the entity itself, in contrast to a personal-capacity suit, in which a plaintiff can seek a judgment against the official's assets. See Id at 166; Arizonans For Official English v. Arizonans, 520 U.S. 43, 137 L.Ed.2d 170 (1997) fn #24 ("State officers in their official capacities, like State themselves, are not amenable to suit for damages under § 1983. See Will v. Michigan Dept. Of State Police, 491 U.S. at 71, and n. 10. State officers are subject to §§ 1983 liability for damages

I their personal capacity, however, even when the conduct in question relates to their official duties, Hafer v. Melo, 502 U.S. 21, 25-31 (1991).").

Defendants was acting under the color of state law and the Ordinances of the City of Niagara Falls, N.Y, when she refused to produce to Petitioner the documents that Petitioner requested from Defendants under the Ordinances of the City of Niagara Falls, N.Y..

Petitioner is precluded from obtaining § 1983 damages against Defendants in an Article 78 proceeding as provided for in CPLR 7806, id. Petitioner has not sued Defendants in their "official capacity" but rather in her personal capacity. ; Kirschner v. Klemons, 225 F.3d 227 (CA2, 2000) (" In an Article 78 proceeding, any restitution or damages...must be incidental to the primary relief sought...and must be such as [the petitioner] might otherwise recover on the same set of facts in a separate action...***suable in the supreme court against the same body or officer in its or his official capacity.***"). (emp added). Hence, since Defendants were not sued in their "official capacity",id, but

rather in their personal capacity Petitioner had no adequate post deprivation remedy that he could obtain in an Article 78 proceeding. CPLR 7806, id; Mitchell v. Fishbein, 377 F.3d 157 (CA2, 2004) ("We note that Mitchell's claims, if cognizable in an Article 78 proceeding, could not have been fully adjudicated in that proceeding because in such a proceeding, a plaintiff may normally seek only declaratory or injunctive relief; ***damages are available only when they are "incidental to the primary relief sought***."). Keane v. New York School, 186 A.D.2d 453, 589 N.Y.S.2d 18, 19 (1st Dep't 1992) (mem) (quoting N.Y.C.P.L.R. § 7806); Kirschner v. Klemons, 225 F.3d 227, 238-39 (2d Cir. 2000); Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 347-49, 712 N.E.2d 647, 690 N.Y.S.2d 478, 481-82 (1999; Luks v. Ascher, 299 A.D.2d 262, 2002 N.Y.App.Div.LEXIS 11254; see Matter of Schwab v. Bowen, 41 N.Y.2d 907, 394 N.Y.S.2d 616, 363 N.E.2d 341; White v. State of New York 161 Misc,2d 938, 941-942, 615 N.Y.S.2d 811.

Primary v. Incidental Relief under CPLR 7806

Second, Petitioner could not obtain any damages in his

section 1983 action. In this case the primary relief sought by Petitioner was the release of the documents requested by Petitioner in his FOIL request. Incidental which is the category that damages fall under, in contract to primary, traveled and survived the journey into New York law. For example, the "incidental" (CPLR 7806) relief sought by Plaintiff in an Article 78 proceeding would be the damages against Defendants for their refusal to release the documents to Plaintiff. In the case of Parker v. Blauvelt Volunteer Fire Co., Inc, 93 N.Y.2d 343, 690 N.Y.S.2d 478 (N.Y. 1999), the Court held that:

> "....we have impliedly indicated our agreement with the Second Circuit's holding in *Davidson v Capuano* . In *Davidson* , the court held that a section 1983 damage claim could not have been joined as part of an article 78 proceeding because it was not "incidental to the primary relief sought" (CPLR 7806); therefore, although arising out of the same operative facts as the prior proceeding, the subsequent section 1983 action was not barred by res judicata (*Davidson v Capuano* , *supra*).
>
> So too here. In plaintiff's prior article 78 proceeding, Supreme Court correctly dismissed his section 1983 civil rights damage claims as not incidental to the primary relief of reinstatement he sought. Therefore, the termination of the prior article 78 proceeding on the merits was not res judicata as to the section 1983 damage claims.

> Davidson v. Capuano, 792 F.2d 275, (CA2, 1986) (" CPLR 7806, which permits damages to be awarded in an Article 78 proceeding only if two conditions are met. First, the damages must be 'incidental to the primary relief sought,' and second, the relief must be 'such as [the petitioner could have recovered] on the same set of facts in a separate action or proceeding suable in the supreme Court against the same body or officer in its or his official capacity.' CPLR 7806.").

The Court in Davidson, id went to hold that "...substantial New York authority does indicate that damages for civil rights violations are not included in this category," citing "Schwab v. Bowen, 41 N.Y.2d 907, 908, 394 N.Y.S.2d 616, 617, 363 N E.3d 341 (1977) (dismissal of Article 78 petition seeking reinstatements 'of course' without prejudice to the institution of any future action seeking damages) D.B.C.B. v. Town of Ramano. 99 A.D. 502, 502-3, 470 N.Y.S.2d 670, 672 (2d Dep't 1984) (claim seeking damages under New York State Civil Rights law is not properly interposed in Article 78 proceeding); Leisner v. Bahou, 97 A.D.2d 860, 861, 469 N.Y.S.2d 255, 258 (3d Dep't 1983), app dismissed 61 N.Y.2d 985, 475 N.Y.S.2d 282, 463 N.E.2d 623, cert denied, ----- U.S.----, 105 S.Ct. 595, 83 L.Ed.2d 704 (1984); Rosari v. blum, 80 A.D.2d 511, 512-13,

435 N.Y.S.2d 596, 598 (1st Dep't 1981)."); Capeda v. Coughlin, 785 F.Supp 385 (S.D.N.Y. 1992) ("...under New York law, a prior adjudication will not bar later claims if the initial forum did not have power to award the full relief sought in the later litigation. Davidson v. Capuano, 792 F.2d 275, 278 (2d Cir. 1986); see also Natale v. Koehler, No. 89 Cov. 6566, slip op., 1991 WL 130192 (S.D.N.Y. July 9, 1991); Davis v. Halpern, 813 F.2d 37, 39 (2d Cir. 1987); Giano v. Flood, 803 F. 2d 769, 770 (2d Cir. 1986): Fay, 802 F.2d at 29. It is by now well-established that, under this exception, a prior **Article 78** proceeding does not preclude a subsequent § 1983 action for damages *since damages for civil rights violations are not available in Article 78 proceedings*; Davidson, 792 F.2d [275] at 282; see also Natale, No. 89 Civ. 6566, slip op. At 7-8; Gutierrez v. Coughlin, 841 F.2d 484, 486 (2d Cir. 1988); 841 F.2d 484; Davis, 813 F.2d at 39; Giano, 803 F.2d at 770-71; Fay, 802 F.2d at 25. This exception applies whether the party against whom claim preclusion is sought was successful or unsuccessful in the Article 78 proceeding, Natale, No. 89 Civ. 6566, slip op. At 7-8.

Therefore, to the extent that the Complaint seeks an award of damages, it is not barred by failure to exhaust New York Municipal Law §§ 50-e and 50-I where damages cannot be obtained since damages is this § 1983 action is "incidental" in an Article 78 § 1983 proceeding to the primary relief of the release of the documents reqeustedt by Petitioner that would have been available to Petitioner in an Article 78 proceeding. Kirschner v. Klemons, 225 F.3d 227 (CA2, 2000) ("...it is highly unlikely that Kirschner could bring his § 1983 claim for money damages against Klemons in his Article 78 proceeding. Although the New York Court of Appeals has held that money damges are recoverable in Article 78 proceedings, they must be 'incidental' to the primary relief sought. See Parker v. Blauvelt Volunteer Fire Co., Inc, 93 N.Y.2d, 690 N.Y.S.2d 478 (N.Y. 1999); see also Davidson v. Capuano, 792 F.2d 275, 278-79 (2d Cir 1986) (observing that damages for civil rights violations do not seem to be obtainable in Article 78 proceedings as they are not 'incidental' to the primary relief sought."). It would be anomalous to conclude that such a remedy forecloses suit in federal courts

when the most it could produce is a state action that would have no effect of granting damages since damages is "incidental" to the primary relief of granting Petitioner's FOIL request.

In this case, Petitioner could not have his day in court in the federal case because he did not invoke an Article 78 § 1983 proceeding in State Court where the Article 78 § 1983 proceeding could not grant him damages as provided for CPLR 7806. Yet, the federal Court could grant damages to Petitioner in the federal court § 1983 action where the damages are not incidental to the primary relief of damages. In short, Petitioner was denied access to the courts in both the State of New York and the Western District U.S. Court. The case of Burgos v. Hopkins, 14 F.ed 787 (CA2, N.Y. 1994) is somewhat analgous in it's analysis to this action: Odrich v. Trustees of Columbia Univ. 2005 NY Misc. LEXIS 2552 ("...a claim for money damages has generally been held to be incidental to the primary relief sought where the Petitioner's entitlement to the money damages in question is dependent upon, and follows as a substantially automatic consequence of, a determination in the petitioner's

favor with respect to the issue(s) which are the primary focus of the Article 78 proceeding. See Matter of Gross v. Perales 72 N.Y.2d 233, 236, 527 N.E.2d 1205, 532 N.Y.S.2d68 (1988).

DUE PROCESS

In this case, which is based on claims of random, unauthorized acts of state employees, "...the Due Process Clause of the Fourteenth Amendment is not violated when a sate employee intentionally deprives an individual of property, or liberty so long as the State [of New YorK] *provides a meaningful post deprivation , remedy.*" Hellenic Am. Neighborhood Action Comm v. City of New York, 101 F.3d 877, 880 (CA2, 1986), citing this Court in Hudson v. Palmer, 468 U.S. 517, 531, 533 (1984). (p. 531 - "...the Due Process Clause of the Fourteenth Amendment is not violated when a state employee negligently deprives an individual of property, *provided that the state makes available a meaningful post deprivation remedy.*"). Since as provided for in CPLR 7806 Petitioner is not entitled to damages and Defendants were not sued in their official capacity, then the state did not make to Petitioner a meaningful or adequate post

deprivation remedy, the Due Process Clause was violated when Defendants acted in their individual and personal capacity by denying to Petitioner his FOIL request.

The violation in this case was Defendants's improperly withholding the documents requested by Petitioner. The State of New York "post deprivation" remedy for the improperly withholding of those documents from Petitioner by Defendants is an Article 78 proceeding. The post-deprivation remedy, at the conclusion of the Article 78 proceedings in for an award of damages. CPLR 7806.

The only time there would be no damages allowable and hence, no constitutional due process violation is "...when there is an adequate state post deprivation procedure to remedy a random, arbitrary deprivation procedure to remedy a random, arbitrary, deprivation of property or liberty." Hellenic, id, citing this Court in Zinermon v. Burch, 494 U.S. at 132; Parratt v. Taylor, 451 U.S. at 541; Hudson v Palmer, 468 U.S. at 531, 533. In this case, there is no adequate post deprivation remedy in an Article 78 proceeding since the primary relief sought in the Article 78

section 1983 action would be the release of the documents requested by Petitioner and the incidental relief sought by Petitioner would be damages in an Article 78 section 1983 action. Davidson v. Capuano, 792 F.2d 275, (CA2, 1986). ("Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.").

For the reasons set forth herein, petitioner thinks it clear that this Court's repeated holdings that exhaustion is not required is correct, and accurately reflects the intention of the 42nd Congress. But even assuming arguendo that the intentions of the Congress that enacted what is now § 1983 were open to varying interpretations so far as exhaustion of administrative remedies is concerned, subsequent history demonstrates uniformly and without contradiction that Congress is aware of, approves of, and has relied on the no-exhaustion rule in § 1983 cases, while at the same time requiring exhaustion in a variety of other contexts.

Congress has carefully decided to require exhaustion in § 1983 cases only in extremely limited circumstances not present here. Porter v. Nussle, 534 U.S. 516 (2002) ("In 1995, as part of the PLRA, Congress invigorated the exhaustion prescription. The revised exhaustion provision, titled "Suits by prisoners," states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. §1997e(a) (1994 ed., Supp. V)."

II. THE DECISION BELOW IS INCONSISTENT WITH EXPRESSIONS OF CONGRESSIONAL INTENT

The Second Circuit's abrogation of the no-exhaustion rule and imposition of an across the board exhaustion requirement is inconsistent with Congressional intention improperly usurped a policy judgment entrusted by the Constitution to Congress. Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981);; Milwaukee v. Illinois, 451 U.S.. 304 (1981).

Certiorari should issue to vacate that judgment, either by

summary should issue to vacate that judgment, ether by summary reversal or for reconsideration in light of the above. The careful attention Congress has provided the problem, and the comprehensive character of the exhaustion scheme it has chosen, confirm an intent not to authorize additional or different procedural requirements. Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981); National Railroad Passenger Corp v. National Association of Railroad Passengers. 414 U.S. 453, 458 (1974); cf. Vermont Yahkee Nuclear Power Corp v. Natural Resources Defense Council, 435 U.S. 519, 524 (1978). Where Congress, informed of this Court's statutory interpretation decisions, fails to disturb them, and subsequently revises them only in narrowly limited circumstances, it is not the judiciary's province to render Congress' recent carefully considered work superfluous or unnecessary. Alyeska Pipeline Service Co v. Wilderness Society, 421 U.S. at 260-271; Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981); Milwaukee v. Illinois, 451 U.S.. 304 (1981).

The recent disposition of Nussle v. Willette, 224 F.3d

95 (2000), reversing the district holding that exhaustion of the administrative remedies is not required for a prisoner claim under § 1997e inaccurately reflects these principles. In reversing the Second Circuit, the Supreme Court in Port v. Nesle, 534 U.S. 516 (2002) held that since 1980 "...exhaustion is now required for all 'actions....brought with respect to prisoner conditions whether under § 1983 or any other Federal law." In this action, the Second Circuit required exhaustion remedies where Congress and this Court has provided that state exhaustion need not be required in § 1983 actions before suing in District court, the Second Circuit just cannot seem to get it right; that is, the Circuit held in Nussle v. Willettee that a prisoner does not have to exhaust administrative remedies, thereby requiring reversal by this Court and in this case, the second has required administrative exhaustion Congress, this Court, courts of other Federal Circuits and New York Courts have held that New york administrative exhaustion is not required. A fortiori the petition for certiorari here should be granted since the Second Circuit cannot seem to get it right.

Finally, it is the very ineffectiveness of CPLR 7806 to grant damages to Petitioner in an Article 78 § 1983 proceeding and it was this very ineffectiveness of state remedies that led Congress to enact the Civil rights Act in the first place. Wilson v. Garcia, 471 U.S. 261, 279 (1985) ("....we are satisfied that Congress would not have characterized 1983 as providing a cause of action analogous to state remedies for wrongs committed by public officials. It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place.

Congress therefore intended that the remedy provided in 1983 be independently enforceable whether or not it duplicates a parallel state remedy. Monroe v. Pape, 365 U.S., at 173 .

Same, Mitchum v. Foster, 407 U.S. 225, 242 (1972).").

III. THE SECOND CIRCUIT ORDER IS INCONSISTENT WITH THIS COURT'S RULINGS IN HECK V. HUMPHREY, 512 U.S. 477)1994); FELDER V. CASEY, 487 U.S. 131 (1988); PATSY V. BOARD OF REGENTS, 457 U.S. 496, 498 (1982); MCNEESE V. BOARD OF EDUCATION, 373 U.S. 668 (1962) , THAT, AT THE LEAST, ADMINISTRATIVE EXHAUSTION MAY NOT BE REQUIRED UNLESS THE DEFENDANT DEMONSTRATES THE ADEQUACY OF ADMINISTRATIVE REMEDIES,

AND THAT ADMINISTRATIVE REMEDIES ARE INADEQUATE WHERE THE OFFICIALS AT THE END OF THE ADMINISTRATIVE PROCESS ARE NOT EMPOWERED TO GRANT DAMAGES IN THIS § 1983 ACTION.

Petitioner has urged that a writ of certiorari should issue to reverse summarily the decision below, or to set the case for full consideration, because it is inconsistent with this Court's repeated decisions, with recently expressed Congressional intent, the Second Circuit's own case, cases of other federal circuits and case of state courts. But even if the Court rejects those arguments, certiorari is warranted here because the judgment below is inconsistent with even the narrowest reading of McNeese v. Board of Education, which stands at least for the rule that: (1) exhaustion may not be considered where the state has not carried its burden of proving that adequacy of state administrative remedies, and (2) such remedies are not adequate where the ultimate administrative officials to which Petitioner will be remanded have no power to grant damages to Petitioner. 373 U.S. 674-76. Here, the defendant had a full opportunity to carry that burden. That they failed to do so is apparent from

Defendant's total and complete failure to attempt to prove any element of CPLR 7806. Accordingly, the judgment below was in error.

In an Article 78 proceeding there is even less power than the "inadequate" administrative body in McNeese, which at least had theoretical power to cut off funds to the erring school district, McNeese, supra at 675-676, and was required to seek to enforce any violations it found. An Article 78 tribunal has no jurisdiction to award damages in a § 1983 action. Desario v. Thomas, 139 F.3d 80 (CA2, 1998), where the Second cited this court in Patsy for the proposition that "exhaustion of state administrative remedies should not be required as prerequisite to bringing an action pursuant to § 1983."This case is in conflict with every case cited by Petitioner in this Petition where the District Court and Second Circuit dismissed Plaintiff's complaint for the reason that Petitioner did not exhaust any State remedies. The reason why Petitioner did not exhaust any state remedies is the very straight forward reasons that Petitioner could not obtain damages in an Article 78 proceeding and Petitioner is not suing Defendants in

their "official capacity." CPLR 7806. It was for these reasons that Petitioner did, in the interest of judicial economy, commence an action in Federal Court in order to obtain the remedy of damages that Petitioner could not obtain in the State Court. Finally, the exhaustion requirement imposed by the Second Circuit and the District Court is directly contrary to repeated reaffirmation of the no-exhaustion rule by this Court, the Second Circuit, State of New York Courts, and lower federal courts all of which are cited herein.

Few cases present this Court with questions as obviously worthy of certiorari as this. Whether plaintiffs in § 1983 actions may be required to exhaust non existent administrative remedies, and if so, under what circumstances, is a question which has occupied the attention of this Court repeatedly since 1963. But as this case makes clear, repeated assertions that courts may not require exhaustion have plainly not had the intended effect. At a minimum, certiorari is required to enforce obedience to law settled by this Court. Every member of this Court has indicated that the exhaustion question or § 1983 cases has been long settled.

The Second Circuit's imposition of an exhaustion requirement therefore raises an important question regarding the duty of the courts of appeals to follow the law as definitely set forth by this Court unless and until overruled. It raises as well as the substantive question of exhaustion itself which should not have to be raised again

Apart from creating a square conflict with cases from this court and other courts as cited herein , the decision below is also inconsistent with the will of congress.. This court has long understood the history behind enactment of § 1983 to reveal a policy preference for federal enforcement of federally guaranteed rights. Forced subjection of § 1983 litigants to the time-consuming, ineffective in this case, and nearly always inadequate, such as in this case since Article 78 proceedings bars Petitioner from the remedy of damages in an Article 78 proceeding, procedures afforded by varying jurisdictions can only dissuade them, and their attorneys, from seeking the relief § 1983 promised.

By requiring plaintiffs in federal court § 1983 litigation

to comply with the state notice of claim statute, the Second Circuit Court of Appeals departed from these basic principles, and it is therefore important that this Court review this case to determine whether Federal courts may erect barriers that force §1983 litigation in the state courts where the remedy of damages cannot be obtained.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, and summarily reverse the judgment below. In the alternative, certiorari should be granted, and the Court should vacate the judgment below and remand for reconsideration in light of the above arguments, or set the case for full argument.

Respectfully submitted,

By: Walter J. Lawrence

Walter J. Lawrence
Petitioner in pro per
#162
3101 SW 34th Ave. #905
Ocala, Fl 34474

TABLE OF CONTENTS FOR APPENDIX

Item **Page**

UNITED STATES DISTRICT
WESTERN DISTRICT OF NEW YORK

WALTER J. LAWRENCE,
Plaintiff

v. DECISION AND ORDER
04-CV-356S

CAROL A. ANTONUCCI, et al.,
Defendants

I. INTRODUCTION

In this case, pro se Plaintiff Walter J. Lawrence contends that Defendants Carol A. Antonucci, Richard J. Rotella, and Ronald D. Anton violated his constitutional rights to due process when they refused to honor his request for documents under New York's Freedom of Information Law ("FOIL"). In addition, Plaintiff alleges that Defendants' failure to provide the requested documents constituted negligence. Currently before this Court is Defendants' Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of civil Procedure and for Sanctions.

II. BACKGROUND

A. Facts

The following facts, which are alleged in the Amended Complaint, are assumed true for purposes of the instant motion. Plaintiff resides in the State of Florida. (Amend. Compl., ¶ 3). At the times relevant to this action. Defendant Antonucci was employed as the Clerk of the city of Niagara Falls, New York ("the city"). Defendant Richard Rotella was employed as the assistant Corporation Counsel of the City, and Ronald D. Anton was acting as the Corporation Counsel for the City. (Amend. Compl., ¶¶ 8, 10, & 12).

On March 12, 2004, Plaintiff sent a "FOIL letter" by certified mail to Defendant Antonucci (Amend. Comp., ¶, Ex. B).[1] In that letter, Plaintiff asked Defendant Antonucci to provide him with certain documents concerning rainbow Square Ltd. Partnership ("Rainbow Square"). David Cordish, a partner with Rainbow Square, and James C. Roscetti, the

---

[1] Plaintiff's FOIL letter is attached as Exhibit B to the amended Complaint.

attorney for the partnership,)Amend. Compl., Exh. B). Defendant Anton was familiar with entity, because he had filed an action on behalf of the City to enjoin rainbow Partnership from erecting any tents, booths, or structures on its commercial property, which did not comply with the City's Planning Board-approved site plan. (Amend. Compl., Exh. A). Plaintiff did not receive any reply from Antonucci or "any other government entity" regarding his FOIL request. (Amend. Compl., ¶¶ 19(b), 22).

B. Procedural History

Plaintiff, acting pro se, commenced the above-captioned action May 11, 2004, by filing a Complaint in the United states district Court for the Western District of New York. On June 3, 2004, Defendant Carol Antonucci filed a motion to dismiss the Complaint, which was denied as moot after Plaintiff filed an amended Complaint on June 25, 2004. On July 3, 2004, Defendants Antonucci, Rotella and Anton filed a Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6) of

the Federal Rules and for Sanctions.[2] This Court deemed argument unnecessary.

III. DISCUSSION

A. Motion to Dismiss Standard

Rule 12(b)(6) fo the Federal Rules of civil procedure provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R.civ.P. 12(b)(6). A court may dismiss an action pursuant to Rule 12(b)(6) if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him t relief." Cohen v. Koenig, 25 F.3d 1168, 1171 (3d Cir. 1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

When a court decides a Rule 12 (b)(6) motion, all well-

---

[2] In support of their Motion to Dismiss and For Sanctions, Defendants filed a Memorandum of Law with exhibits, an Affirmation of Richard J. Rotella in Response with an exhibit, and an Affirmation of Richard J. Rotella in Reply with an exhibit. Plaintiff filed a Reply and supplemental Reply in Opposition to Defendants' Motion.

pleaded allegations are assumed true and construed in the non-moving party's favor. Hamilton Chapter of Alpha Delta Phi, Inc. Hamilton Coll., 128 F.3d 59, 63 (2d Cir. 1997). (citing Hosp. Bldg. Co. V. Trustees of Rex Hosp. 425 U.S. 738, 740, 96 S.Ct. 1848, 1850, 48 L.Ed.2d 338 (1976)). In the context of such a motion, "[t]he issue is not whether a plaintiff will or might ultimately prevail on her claim, but whether she is entitled to offer evidence in support of the allegations in the complaint." Hamilton Chapter, 128 F.3d at (citation omitted).

B. Defendant's Motion to Dismiss

Plaintiff asserts four causes of action against Defendant. In the first cause of action, brought pursuant to 42 U.S.C. ¶ 1983, Plaintiff alleges that Defendants violated his constitutional right to due process when they refused to honor his FOIL request. Plaintiff's second cause of action claims that Defendants engaged in an unlawful conspiracy to violate his constitutional rights by denying his FOIL request. In the third and final cause of action, Plaintiff alleges that he was damaged

by Defendants' negligent failure to provide the requested documents.[3]

Defendant argues that all three causes of action should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. This Court will address each

---

[3] The Amended Complaint contains a section captioned "Fourth Cause of Action: Substantive Allegations," The allegations set forth therein, however, appear only to buttress Plaintiff's Cause of Action for negligence. For example, paragraph 85, contained in the "Substantive Allegations" section, states that "it was negligent or wrongful for Defendants to deny Plaintiff his written Freedom of Information law request. (Amend. Compl ¶ 85). Accordingly, this Court does not construe the "Substantive Allegations" section as a separate cause of action against the Defendants.

This Court does note, however, that the "Substantive Allegations" section appears to assert a claim against the City of Niagara Falls under Section 1983. Specifically, Plaintiff alleges that "the failure of the City of Niagara falls, State of New York to properly and adequately train, supervise and control Defendants constitutes negligent or wrongful acts or omissions on the part of the City of New York Falls." (Amend. Compl., ¶ 88). As an initial matter, this Court notes that Plaintiff repeatedly argues in his pagers that the City is not a party to this action. (Plaintiff's Supp. Reply, p.1). Even assuming the City was a part to this action, Plaintiff's allegation is insufficient to establish liability against the City, because this Court finds that Defendants Antonucci, Rotella, and Anton did not violate Plaintiff's constitutional rights, See Curley v. Vill. 268 F.3d 65, 71 (2d Cir. 2001) ([A] municipality cannot be liable for inadequate training or supervision when [there is not violations of] the plaintiff's constitutional rights.").

causes of action in turn.

1. Due Process

Section 1983 of Title 42 of the United States code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state....subjects. Or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Under this section, an individual whose constitutional rights have been violated by a person acting under color of state law may file a lawsuit in federal court seeking compensation. Richardson v. McKnight, 521 U.S. 399, 403, 117 S.Ct. 2100, 2103, 138 L.Ed.2d 540 (1997).

To prevail in a Section 1983 action, "a plaintiff must prove that the challenged conduct was attributable at least in part to a person acting under color of state law, and that the conduct deprived the plaintiff of a right, privilege, or immunity

secured by the Constitution or laws fo the United States." Wimmer v. Suffolk Police Dep't 176 F.3d 125, 137 (2d. 1999).

The Fifth and Fourteenth Amendments provide that no person may be deprived of life, liberty without "due process of law." U.S. Const. Amend V, XIV. There are two broad categories of due process claims - substantive and procedural. A substantive due process claim is based upon the deprivation of a constitutionally protected live, liberty, or property interest, See B.D. v. DeBuono, 130 F.Supp. 2d 401, 402 (S.D.N.Y. 2000). a PROCEDURAL DUE PROCESS VIOLATION OCCURS WHEN THE Government deprives a person of a protected life, liberty, or property interest without first providing that person with notice and an opportunity to be heard, Id at 432-33.

Plaintiff's Amended Complaint does not precisely define the nature of his due process claim, However, this Court is mindful of its duty to construe this pro se pleading liberally and "interpret [it] to raise that strongest arguments that [it]

suggest[s]." Soto v. Walker, 44 F.3d 169, 173 (@d. 1995). Consistent with this obligation, this Court reads the Amended Complaint as claiming that: (1) Plaintiff had a constitutionally protected property interest in the documents requested under FOIL; and (2) Defendants deprived Plaintiff of that interest without due process of law.

a. Property Interest

With respect to any due process claim, "t]he threshold issue is always whether the plaintiff has a property interest protected by the Constitution." Narumanchi v. Bd. of Trustees of Conn. State Univ. 850 F.2d 70, 72 (2d Cir.1988). "If a protected interest is identified, a court must then consider whether the government deprived the plaintiff of that interest without due process." (Emphasis in original).

"A protectible property interest is not created by the Constitution." Ferrara v. Superintendent, N.Y.S. Police Dep't 26 F.Supp. 2d 410, 414 (N.D.N.Y. 1998) (citing Bd.. Of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33

L.Ed.2d 548 (1972)). "Rather, [property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Ferrara, 26 F.Supp. 2d at 414)alteration in original) (quoting Roth, 408 U.S. at 577). "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it[:h]e must, instead, have a legitimate claim of entitlement to it." Ezekwo v. New York City Health & Hosps. Corp. 940 f.2d 775, 782 (2d cir. 1991)(quoting Roth, 408 U.S. at 577).

This Court finds that Plaintiff has failed to establish that he had a constitutionally protected property interest in the requested documents. As Several courts in this Circuit have held, "a plaintiff has no property interest in obtaining FOIL documents." O'Bradovich v. Vill. of Tuckahoe, No, 04-CV-49, 2004 WL 1616588, at *15-16 (S.D.N.Y. July 19, 2004); Webb v. Ashburn, No, 96-Civ-325, 1997 WL 118355, at *6 (S.D.N.Y. Mar. 17, 1997); Billups v. Millet, No. 91-

Civ-6326, 1996 WL 99399, at *4(S.D.N.Y. Mar. 6, 1996); but see Ferrara, 26 F.Supp.2d at 414.

"[A] property interest must be more than an expectation, a person must have more interest than an abstract need or desire for the benefit sought." Billups, 1996 WL 99399, at *4 (citing Roth, 408 U.S. at 577). There is no property interest in documents requested under FOIL because such "documents are [merely] an expectation, even if awarded pursuant to court order." Billups, 1996 WL 99399, at *4 (citing N.Y.Pub.Off.Law §§ 89(4)(b).

Accordingly, with respect to the question of constitutional due process and FOIL requests, "adequate process is clearly available through Article 78 proceeding to remedy an improper denial of disclosure." Ferrara, 26 F.Supp. Ad at 414 n.3. In other words, the procedures set forth under New York law are sufficient to protect any property interest that a person might have in the receipt of FOIL documents. Billups, 1996 WL 99399, at *5 (dismissing due process claim

based upon denial of FOIL request because, inter alia, "the due process available to Plaintiff - pleadings, motions, hearings, Article 78 proceedings and contempt, were sufficient to protect any property interest.").

In this case, plaintiff did not appeal the denial or inaction regarding his FOIL request. Further, he never sought to commence an Article 78 proceeding to challenge Defendants refusal to honor his FOIL letter. Plaintiff this willfully failed to take advantage of the due process afforded to him under New York law, and he cannot now complain that he has been denied due process. See Farrara, 26 F.Supp.2d at 414 n.3 (Having willfully failed to avail himself of the appellate process."); see also Webb, 1997 WL 118355, at *6 ("Plaintiff's failure to commence an Article 78 proceeding and obtain a court order with regard to his other FOIL request precludes a finding of a property interest in the requested documents.).

This Court notes that Plaintiff was required to pursue an Article 78 proceeding, before commencing this suit, even in the

absence of a formal written denial of his FOIL request. As noted above, subject to certain exceptions not applicable here, "any person denied access to a record may within thirty days appeal in writing such denial." N.Y.Pub.Off.Law. § 89(4)(a). The only prerequisite set forth in this provision is that the person must have been denied access to a record. There is no requirement that the person receive a written denial before initiating an appeal. Cf. Kaufman v. N.Y.S.Dep't of Envil. Conservation, 734 N.Y.S.2d 694, 696 (N.Y.App.Div.2001)(noting that the question of "[w]hether or not respondent provided petitioner with a full written explanation at the administrative level...is academic.").

2. Conspiracy

To prevail on his conspiracy claim under section 1983, Plaintiff must prove: (1) that two or more persons conspired to deprive him of a constitutional right; and (20 that he was in fact deprived of that constitutional right as a result of the conspiracy. Adamczyk v. City of Buffalo, No.95-CV-1023,

1998 WL 89342, at *6(W.D.N.Y. Feb.23, 1998)(citing Singer v. Fulton County Sheriff, 63 F.3d 110, 119-20 (2d Cir. 1005). For the reasons stated above, this Court finds that Plaintiff has failed to establish that his constitutional rights were violated. As such, his Section 1983 conspiracy claim must be dismissed. See Adamczyk, 1998 WL 89342, at *6; Billups, 1996 WL 99399, at *6.

3. **Negligence**

In light of the fact that all of Plaintiff's federal claims have been dismissed, this Court is not required to retain jurisdiction over his state law negligence claim. See 28 U.S.C. § 1367(c)(3). "The decision to exercise pendent jurisdiction is vested in the sound discretion of the district court." Grace v. Rosenstock, 228 F.3d 40, 55 (2d Cir. 2000)' Rocco v. N.Y.S. Teamsters Conference Pension & Ret. Fund, 281 F.3d 62, 72 (2d Cir. 2002).

The Second Circuit has noted that district courts should typically decline to exercise jurisdiction over state law claims

where all federal claims have been eliminated before trial. Travelers Ins. Co. V. Keeling, 996 F.2d 1485, 1490 (2d Cir. 1993)' see also Martz v. Inc. Vill. Of Valley Stream, 22 F3d. 26, 32 (2d. 1994) ("Having dismissed all of [the] federal claims, the district court was correct in also dismissing [the] pendent state law claims.").

Plaintiff's negligence claim involves numerous questions of state law, including issues with respect to the applicable statute of limitations. This Court finds that resolution of these questions is best left to the state courts. Plaintiff's state law negligence claim will therefore be dismissed without prejudice. See Burgos v. City of Rochester, No, 99-CV-6480, 2003 WL 22956907, at *6 (W.D.N.Y. Mar. 31, 2003)(citing Giordano v. City of New York, 274 F.3d 740, 754 (2d Cir. 2001)); United Mine Workers v. Gibbs, 383 U.S. 715, 726 n.15, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

C. Defendants' Motion for Sanctions

"A district court may, in its discretion, impose sanctions

against litigants who abuse the judicial process." Shafil v. British Airways, PLC, 83 F.3d 566, 571 (2d Cir. 1996). The Second Circuit has set forth several factors to be considered in restricting a litigant's future access to courts: "(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g. does the litigant have an objective good faith expectation of prevailing?' (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (50 whether other sanctions would be adequate to protect the courts and other parties." Iwachiw v. New York Dept. Of Motor Vehicles, 396 F.3d 525, 528-30 (2d Cir. 2005) (citing Safir v. United States Lines, Inc , 792 F.2d 19, 24 (2d Cir. 1986)).

In the instant case, this Court notes that Plaintiff appears to have a long history of filing abusive, frivolous and non-meritorious lawsuits in the Federal Court System, that he

has been twice jailed for contempt of court, and that he has been enjoined on numerous occasions from filing duplicative bankruptcy petitions, cases, or appeals. See Lawrence v. United States, No. 99-1926, 2000 WL 1182452 (6th Cir. Aug 15, 2000); Lawrence v. Bucci, No.98-1788, 1999 WL 617969 (6th Cir. Aug. 12, 1999); Lawrence v. United States, No.95-2284, 1996 WL 325216 (6th cir. June 12, 1996); United States v. Lawrence, No. 94-2309, 1995 WL 302247 (6th Cir. May 17, 1995); Lawrence v. United States, No. 92-2434, 1993 WL 360952 (7th Cir. Sept. 14, 1003); Lawrence v. Remes, No. 92-1213, 1992 WL 361381 (6th Cir. Dec. 8 1992); Lawrence v. Fricke, No. 91-1246, 1991 WL 100630 (6th Cir. June 11, 1991).

This court is mindful that Plaintiff is acting pro se, and that the allegations of the pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. Iwachiw, 396 F.3d at 529 (citing Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1971)). However, courts are not obligated to construe the procedural

rules in ordinary civil litigation to excuse frivolous or vexatious filings by pro se litigants, Iwachiw, 396 F.3d 529 (citing NcNeil v. United States, 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.21 (1993).

With respect to the instant matter, the Court notes that this is the second lawsuit filed by Plaintiff in connection with alleged denial of his FOIL requests. A review of the record in the first-filed case, Lawrence v. Baxter, reveals that this Court denied Plaintiff's motion t amend his Complaint to include claims against Defendants Rotella and Anton on August 31, 2004, on the basis that such an amendment would be futile. (Lawrence v. Baxter, 03-CV-228, Docket No, 78). As such, this Court has been put to the task of reviewing the sufficiency of Plaintiff's allegations against these defendants on two occasions. Moreover, the Corporation Counsel for Niagara Falls has been required to defend City employees against not one but two federal actions based on the same alleged deprivation. In this respect, Plaintiff has imposed unnecessary

expense on Defendants and undue burden on this Court.

Nonetheless, the Court finds that sanctions are not appropriate at this juncture Plaintiff is warned that if he files another federal case against the City of Niagara Falls or its employees predicated on the denial of his FOIL request, he will be subject to sanctions. Plaintiff has been put on notice by the foregoing decision as well as this Court's decision in Lawrence v. Baxter that his FOIL claims are not actionable.

IV. CONCLUSION

IT HEREBY IS ORDERED that Defendants' Motion to Dismiss the Amended Complaint (Docket No. 11) is GRANTED.

FURTHER, that Defendants' Motion for Sanctions (Docket No. 11) is DENIED.

FURTHER, that the Clerk of the Court shall take the steps necessary to close this case.

SO ORDERED.

Dated: March 16, 2005
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 27th day of September, two thousand and five.

PRESENT: HON. RALPH K. WINTER,
HON. SONIA SOTOMAYOR,
HON. RICHARD C. WESLEY,
Circuit Judges,

HON. DENISE COTE,

District Judge.

WALTER J. LAWRENCE,

Plaintiff-Appellant, No. 05-1627-cv

CYNTHIA BAXTER, et al.,

Defendants-Appellees.

APPEARING FOR APPELLANT: WALTER J. LAWRENCE,
Pro se,
Ocala, FL.

APPEARING FOR APPELLEES: JOHN J. GILMOUR,
Assistant Corporation
Counsel,
Niagara Falls, NY.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the United States District Court for the Western District of New York (Skretny, J.) is AFFIRMED.

Walter Lawrence, pro se, appeals from the district court's judgment granting the defendants' motion to dismiss his 42 U.S.C. § 1983 complaint for failure to state a claim. We assume the parties' familiarity with facts of the case, its relevant procedural history, and the issues on appeal.

We review *de novo* a district court's decision to dismiss a complaint for failure to state a calim and take all factual allegations in the complaint as true and construe all reasonable inferences in favor of the plaintiff. *See Friedl v. City of New York*, 210 F.3f 79, 83 (2d Cir. 2000).

In his complaint, Lawrence claims that defendants deprived him of his property interest in certain documents, and due process of law, by refusing to honor his request for documents under New York's Freedom of Information Law ("FOIL:). Where a state employee intentionally, and without authority, deprives an individual of property, a procedural due process violation exists only of the state fails to provide the litigant with a meaningful post-deprivation remedy. *See Hellenic American Neighborhood Action Comm v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996). A

proceeding under Article 78 of New York's Civil Practice Law and Rules. ("Article 78") is adequate for due process purposes, even though a litigant cannot recover the same relief he or she may been able to recover in a § 1983 action . Id. At 881. Further, although Lawrence is correct in his assertion that litigants are generally not required to file an Article 78 proceeding before suing under § 1983, an Article 78 proceeding in this matter is not part of an exhaustion requirement, but is, for purposes of the federal Due Process Clause, the process available to Lawrence for a violation of FOIL. Accordingly, Lawrence failed to state a claim under § 1983 and the district court correctly dismissed the complaint on this ground.

Because the district court did not impose sanctions on Lawrence, there is no claim ripe for review that the district court erred in warning Lawrence that he will be subject to sanctions if he files another complaint against Niagara Falls, or any of its employees, in relation to his FOIL request, *See Abbot Labs v. Gardner*, 387 U.S. 136, 148 (1967). More than adequate evidence exists in the record to support the district court's conclusion that Lawrence's filing of another complaint relating to his FOIL request

would warrant the imposition of sanctions, as such an action would be taken "in bad faith." *Alyeska Pipeline Serv. Co. V. Wilderness Soc'y* 421 U.S. 240, 258-59 (1975), superceded by statute on other grounds, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 42 U.S.C. § 1988(b).

We have reviewed Lawrence's other claims and find them to be without merit.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT
Roseann B. MacKechnie, Clerk

By:_____
Richard Alecantra,
Deputy Clerk

STATUTES INVOLVED

42 U.S.C. § 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, subjects, or causes to be subjected, any citizen of the United states or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act, or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Municipal Law §§ 50-e(a) and 50-I:

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

50-I. No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-I of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter,

CPLR 7806:

The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.